

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON MICHAEL ELLISON,

Defendant-Appellant.

UNPUBLISHED
February 27, 2014

No. 313422
Jackson Circuit Court
LC No. 12-004558-FH

Before: SHAPIRO, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of unlawful imprisonment, MCL 750.349b, and domestic assault, third offense, MCL 750.81(4). Defendant was sentenced as a fourth habitual offender, MCL 769.12, for both offenses. He was sentenced to a term of 46 to 180 months' imprisonment for his domestic assault, third offense, conviction, and a concurrent term of 200 to 300 months' imprisonment for his unlawful imprisonment conviction. We affirm.

On appeal, defendant first argues that there was insufficient evidence to show that he unlawfully imprisoned Marquee Jeppesen. We find this argument meritless.

Questions regarding sufficiency of evidence are reviewed de novo. *People v Osby*, 291 Mich App 412, 415; 804 NW2d 903 (2011). "[A] court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crimes were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). "We do not interfere with the jury's assessment of the weight and credibility of witnesses or the evidence, and the elements of an offense may be established on the basis of circumstantial evidence and reasonable inferences from the evidence[.]" *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013) (citations omitted).

MCL 750.349b, the statute codifying unlawful imprisonment, provides:

1) A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:

(a) The person is restrained by means of a weapon or dangerous instrument.

(b) The restrained person was secretly confined.

(c) The person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony.

* * *

(3) As used in this section:

(a) “Restrain” means to forcibly restrict a person’s movements or to forcibly confine the person so as to interfere with that person’s liberty without that person’s consent or without lawful authority. . . .

Upon “view[ing] the evidence in a light most favorable to the prosecution[.]” *Johnson*, 460 Mich at 723, we find the record contains sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that defendant unlawfully imprisoned Jeppesen. Jeppesen testified that defendant forced her to remain in his trailer by threatening her with a knife. A police officer testified that he found a knife that was identical to the one described by Jeppesen when he searched defendant’s trailer. This testimony, when viewed in a light most favorable to the prosecution, establishes that a rational juror could have found beyond a reasonable doubt that defendant unlawfully imprisoned Jeppesen because it shows that he “knowingly restrain[ed]” her “by means of a weapon or dangerous instrument.” MCL 750.349b(1)(a).

Defendant asserts that there was insufficient evidence to prove that Jeppesen was secretly confined or that defendant restrained Jeppesen for the purpose of facilitating the commission of another felony or flight after commission of another felony; however, the prosecution was not required to prove these elements, because one is guilty of unlawful imprisonment if he forcibly confines a victim under *any* of the circumstances provided by MCL 750.349b(1)(a)-(c). In *People v Hesch*, 278 Mich App 188, 195; 749 NW2d 267 (2008), this Court held:

The commonly understood word “any” generally casts a wide net and encompasses a wide range of things. “Any” has been defined as: “1. one, a, an, or some; one or more without specification or identification. 2. whatever or whichever it may be. 3. in whatever quantity or number, great or small; some. 4. every; all....” [*Id.*, quoting *People v Lively*, 470 Mich 248, 253-254, 680 NW2d 878 (2004), quoting *Random House Webster’s Dictionary* (2d ed, 1997).]

The most common and ordinary meaning of the word “any” is “one” or “one or more,” *id.*, and it is clear that the Legislature intended that “[a] person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under [one or more] of the following circumstances” listed in MCL 750.349b(1)(a)-(c). The term “any” as used in MCL 750.349b does not mean “all” of the alternatives must be present, and if the Legislature intended to use the word “all,” it would have done so. Thus, no evidence of the other two alternative elements of unlawful imprisonment was needed for a conviction.

Defendant next asserts that the trial court erred at sentencing because it scored 15 points for Offense Variable (OV) 8, and OV 8 cannot be so scored when the sentencing offense is unlawful imprisonment. This argument is also without merit.

When reviewing a trial court's scoring decision, its "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013) (footnote omitted). In making factual determinations, the trial court may rely on reasonable inferences arising from the record. *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438 (footnote omitted).

OV 8 of the sentencing guidelines addresses victim asportation or captivity. MCL 777.38(1). Pursuant to MCL 777.38(1)(a), 15 points are assigned for OV 8 if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." Zero points are assigned "if the sentencing offense is kidnapping," MCL 777.38(2)(b). The statute does not define kidnapping, nor does it refer to a specific codification of kidnapping. See *id.* However, in *People v Kosik*, __ Mich App __; __ NW2d __ (Docket No. 312518, issued November 12, 2013), slip op at 6, this Court addressed "whether 'kidnapping as used in MCL 777.38(2)(b) refers to kidnapping as defined in the current MCL 750.349 or in a broader sense as in the former statute, which would include unlawful imprisonment." This Court held, contrary to defendant's argument on appeal, that OV 8 can be scored when the sentencing offense is unlawful imprisonment, stating:

Simply put, the plain language of MCL 777.38 exempts scoring OV 8 only for "kidnapping." The Legislature made unlawful imprisonment a distinct crime and chose not to amend MCL 777.38(2)(b) to include unlawful imprisonment, although it amended MCL 777.16q to reflect the addition of unlawful imprisonment in the list of crimes to which the sentencing guidelines apply. The Legislature was presumed to be aware of the exemption in MCL 777.38 when it revised MCL 750.349 and added MCL 750.349b, and it was presumed to have considered the effect this would have on MCL 777.38. In light of these presumptions, we conclude that the Legislature intended that MCL 777.38(2)(b) only exempt the particular crime of kidnapping. [*Id.* at 7.]

Although *Kosik* was decided after defendant was sentenced, it is well established that, generally, judicial decisions are to be given complete retroactive effect. *People v Doyle*, 451 Mich 93, 104; 545 NW2d 627 (1996), cert den sub nom *Doyle v Michigan*, 519 US 873; 117 S Ct 192; 136 L Ed 2d 129 (1996).

Defendant finally argues that the trial court erred in scoring five points for OV 10 because no evidence showed a difference in size or strength between him and Jeppesen. This argument is without merit.

Offense variable 10 of the sentencing guidelines addresses the exploitation of a vulnerable victim. MCL 777.40(1). Pursuant to MCL 777.40(1)(c), five points are assessed for OV 10 if "[t]he offender exploited a victim by his or her difference in size or strength, or both" MCL 777.40(2)(b) provides that "[e]xploit" means to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(c) defines "vulnerability" as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation."

At sentencing, the trial court found on the basis of record testimony that defendant exploited Jeppesen by way of a difference in size and strength. In making factual determinations, the trial court may rely on reasonable inferences from the record. *Earl*, 297 Mich App at 109 (citation omitted). Jeppesen testified that defendant dragged her down the street towards the trailer against her will and that he put her in a headlock, thereby forcing her mouth closed and rendering her unable to “do anything.” Jeppesen also testified that defendant then forcibly carried her into his trailer. Because this testimony provided a basis for the trial court to reasonably infer a difference in size and strength between the two individuals, it did not clearly err. *Id.* It is clear that “the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute[.]” *Hardy*, 494 Mich at 438. Defendant clearly “exploited” Jeppesen because he “manipulate[d] a victim for selfish or unethical purposes.” MCL 777.40(2)(b). This was accomplished by a “difference in size or strength,” MCL 777.40(1)(c), as detailed *supra*. Therefore, five points were correctly scored for OV 10.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Jane E. Markey
/s/ Cynthia Diane Stephens